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DEC - 8 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

December 8, 1995

0265.142(A)

**BY HAND**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Request for Stay  
General Docket No. 90-314


93-144

Dear Mr. Caton:

Enclosed please find the original and four (4) copies of Radiofone's Emergency Request for Stay for filing with the Commission.

If you should have any questions regarding this matter, kindly direct them to the undersigned.

Yours truly,

  
Ashton R. Hardy

ARH/mv  
Enclosures

cc: All Commissioners  
William Kennard

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EX PARTE OR LATE FILED

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Before the  
**Federal Communications Commission**  
Washington, DC 20554

DEC - 8 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New Personal	)	RM-7140, RM-7175,
Communications Services	)	RM-7618
	)	
Amendment of the Commission's	)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	
	)	
Implementation of Sections 3(n)	)	GN Docket No. 93-252
and 332 of the Communications Act	)	
- Regulatory Treatment of	)	
Mobile Services	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	
Future Development of SMR Systems	)	
in the 800 MHz Frequency Band	)	
	)	
Amendment of Parts 2 and 90 of the	)	PR Docket No. 89-553
Commission's Rules to Provide for	)	
the Use of 200 Channels Outside	)	
the Designated Filing Areas in	)	
the 896-901 MHz and 935-940 MHz	)	
Band Allotted to the Specialized	)	
Mobile Radio Pool	)	

**EMERGENCY REQUEST FOR STAY**

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Section 1.43 of the Commission's Rules, 47 C.F.R. § 1.43, respectfully requests the Commission to stay the effectiveness of its C Block broadband PCS auction rules and its rules concerning the eligibility of cellular licensees to obtain PCS licenses, as adopted in numerous

orders in the above-captioned dockets, including: (a) the Second Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 2348 (1994), Fifth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 5532 (1994), and Fifth Memorandum Opinion and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 10 FCC Rcd. 403 (1994), in PP Docket No. 93-253; (b) the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 78 R.R. 2d 934 (1995), in combined dockets; (c) the Second Report and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 8 FCC Rcd. 7700 (1993), Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd. 4957 (1994), and Third Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd. 6908 (1994), in GEN Docket No. 90-314; and (d) the Third Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd. 7988 (1994), in combined dockets that include GEN Docket No. 93-252.

Concurrent with this Request for Stay, Radiofone is filing an Emergency Petition for Rulemaking. The Emergency Petition requests the Commission to amend its rules concerning the cross-ownership of cellular and PCS licenses, as required by the order of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in Cincinnati Bell Tel. Co. v. FCC, No. 94-3701 (6th Cir. Dec. 1, 1995) (mandate

issued). In this Request, Radiofone asks the Commission to stay the C Block broadband PCS auction rules and its rules concerning the eligibility of cellular licensees to obtain PCS licenses, until the Commission completes its action on Radiofone's Emergency Petition for Rulemaking. Radiofone therefore requests the Commission to stay the C Block PCS auction.

### **THE NEED FOR A STAY**

The rule changes requested by Radiofone in its Emergency Petition are required in order for the Commission to comply with the recent decision of the Sixth Circuit in Cincinnati Bell. The Sixth Circuit determined that the Commission's cellular-PCS cross-ownership rule arbitrarily prevented small cellular companies, such as Radiofone, from obtaining 30 MHz PCS licenses in their cellular service areas, see 47 C.F.R. § 24.204, and the court directed the Commission to develop rules consistent with the court's opinion, Cincinnati Bell, slip op. at 21-22, 30. As stated in the Emergency Petition, Radiofone submits that, in implementing the Sixth Circuit's directions, it is necessary and in the public interest that the Commission act expeditiously to amend the cellular-PCS cross-ownership rule, 47 C.F.R. § 24.204, the 45 MHz spectrum cap, 47 C.F.R. § 20.6, and any related rules to ensure that they do not have the effect of frustrating the Sixth Circuit's order. Radiofone submits that a Commission decision to hold the auction first and then promulgate the rules later would be inappropriate and prejudicial to the auction participants and the public interest.

### **STANDARD FOR GRANT OF STAY**

Radiofone satisfies the standards for grant of a stay as set forth in Virginia Petroleum Jobbers Ass'n v. Federal Power Comm., 259 F.2d 921, 925 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir 1977). In granting a stay, the Commission considers: (a) the likelihood of the requesting party's success on the merits; (b) the likelihood that irreparable harm to the requesting party will result in the absence of a stay; (c) the absence of harm to other interested parties in the event that the stay is granted; and (d) the extent to which the stay serves the public interest. Virginia Petroleum Jobbers, 259 F.2d at 925. All four factors require the Commission to stay the C Block PCS auction rules, and the rules concerning cellular and PCS cross-ownership. Consequently, the Commission must stay the C Block PCS auction.

#### **A. Radiofone Is Likely to Succeed on the Merits of Its Emergency Petition for Rulemaking**

As demonstrated in Radiofone's Emergency Petition for Rulemaking, the Sixth Circuit has "conclude[d] that the FCC has acted arbitrarily in adopting its Cellular eligibility restrictions. Cincinnati Bell, slip op. at 21. And the Court held that "[b]efore the FCC may foreclose such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region, it must provide something in the way of documentary support for its asserted fears that Cellular providers will detrimentally affect the market if allowed to become Personal Communications Service licensees." Id. Thus, the FCC cannot continue under rules that would bar Radiofone from acquiring a 30 MHz license without the "further

proceeding" directed by the Court. For these reasons, Radiofone is likely to succeed on the merits of its petition for rulemaking, because -- unless the Commission simply eliminates the rules that would preclude Radiofone from acquiring a 30 MHz license -- if the Commission does not act to re-examine the rules, it will be violating the court's order.

**B. Absent a Stay, Radiofone Will Suffer Irreparable Harm**

Absent a stay of the C Block PCS auction, Radiofone will suffer irreparable harm by participating in an auction for which the rules are unclear. Radiofone, through its affiliates, has already submitted a substantial upfront payment to participate in the auction. Under the FCC's auction rules, the FCC could impose serious penalties on Radiofone if it is forced to withdraw a high bid due to regulatory or judicial action that occurs during the auction. Similarly, the FCC could impose penalties if it were to disqualify Radiofone after the auction has ended. The FCC's Public Notice permitting Radiofone to participate in the auction provided no assurance that Radiofone would not be subject to forfeiture of its upfront payment and other FCC penalties in the event that the rules that result from further judicial and administrative proceedings would render Radiofone ineligible to obtain a C Block license.

On top of this substantial risk is the greater threat that the FCC will revoke Radiofone's PCS license at some time in the future, after Radiofone has borrowed and invested the \$50 to \$100 million necessary to acquire a PCS license in the auction, build a PCS system, and operate it in a competitive marketplace. Even though the FCC has suggested in its pleadings before the Sixth Circuit that Radiofone would be

allowed to sell its PCS operation or cellular system to a qualified buyer in the event that the FCC's new rules prevent Radiofone from holding such a license, the consequences for Radiofone would be grave, because the revenue derived from such a forced sale would not approach the value of an ongoing PCS operation.

Furthermore, if Radiofone were to win a 30 MHz PCS license, it will be forced to forego participating in the upcoming 10 MHz PCS auctions. The FCC made no suggestion in its Public Notice that Radiofone would be allowed to retroactively participate in such auctions in the event that the FCC's new rules prevent Radiofone from holding any 30 MHz license it wins in the C Block auction.

**C. Other Interested Parties Will Not Be Harmed If the Stay Were Granted**

No other parties will be harmed should the Commission grant Radiofone's request. Any fears about a headstart advantage are unfounded. If C Block licensees were validly concerned about the approximately one-year headstart that the A and B Block winners will have, such a headstart pales in comparison to the 12-year headstart the cellular licensees had over the A and B Block winners, and the cellular headstart was no deterrent to the A and B Block bidders. Radiofone itself faced a two-year headstart enjoyed by the wireline cellular licensee in its cellular service areas, and overcame any headstart advantage by providing superior service and engaging in aggressive marketing. In any event, any headstart enjoyed by A and B block licensees is the product of the Commission's decision to hold the A and B block auction before the entrepreneur's C block auction.

Furthermore, the stay does not need to last long. The FCC could simply issue an order eliminating the rules at issue in Radiofone's Emergency Petition, or hold an expedited rulemaking. Even if, for the sake of the argument, there were any legitimate concern about a headstart advantage increasing due to the grant of a stay, the amount of harm would be related to the date licenses are awarded, not the date that the auction commences. The FCC could make up for a later start date by changing the auction procedures to make the auction run faster, such as by scheduling more rounds each day, or moving from one stage to another at a quicker pace. In sum, another short delay will not irreparably harm the C Block auction applicants, and in any event, such a delay can be remedied by speeding up the auction process.

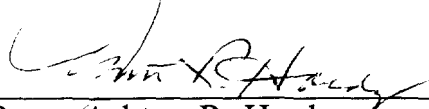
**D. The Public Interest Favors the Grant of a Stay**

The public interest is best served by the requested stay. Granting the stay would provide each participant a level of certainty concerning the rules that will ultimately be applied to the winning licenses. Otherwise the FCC will be in the untenable and inappropriate position of holding the auction first and making the auction rules later. The uncertainty that would result from holding the auction while Radiofone's Emergency Petition for Rulemaking is pending would harm the public interest, because the Commission and the auction participants would be required to expend their time and scarce resources on a flawed auction rather than awaiting resolution of the important issues raised in Radiofone's Emergency Petition.

## **CONCLUSION**

For the foregoing reasons, Radiofone respectfully requests that the Commission stay the C Block PCS auction rules and the rules concerning the eligibility of cellular licensees like Radiofone to obtain 30 MHz PCS licenses, thereby staying the C Block PCS auction, until the Commission concludes its re-examination of the rules, as requested in Radiofone's Emergency Petition for Rulemaking and as required by the Sixth Circuit's opinion in Cincinnati Bell.

Respectfully submitted,  
**RADIOFONE, INC.**

  
By: Ashton R. Hardy  
Michael Lamers

Its Attorneys

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December 8, 1995

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